JUL 29 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 245

OLIVER V. KESSLER,
Petitioner,

vs.

FAUQUIER NATIONAL BANK, AS ADMINISTRATOR, C.T.A. OF THE ESTATE OF ROSE MEREDITH KESSLER, DECEASED; THOMAS F. McGLONE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF THOMAS F. McGLONE, SR., DECEASED; MABEL McGLONE; EDWARD B. McGLONE; ROBERT McGLONE; PETER J. ISENSEE, AS BISHOP OF DIOCESE OF RICHMOND, A CORPORATION SOLE; AND AGNES J. KEAN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

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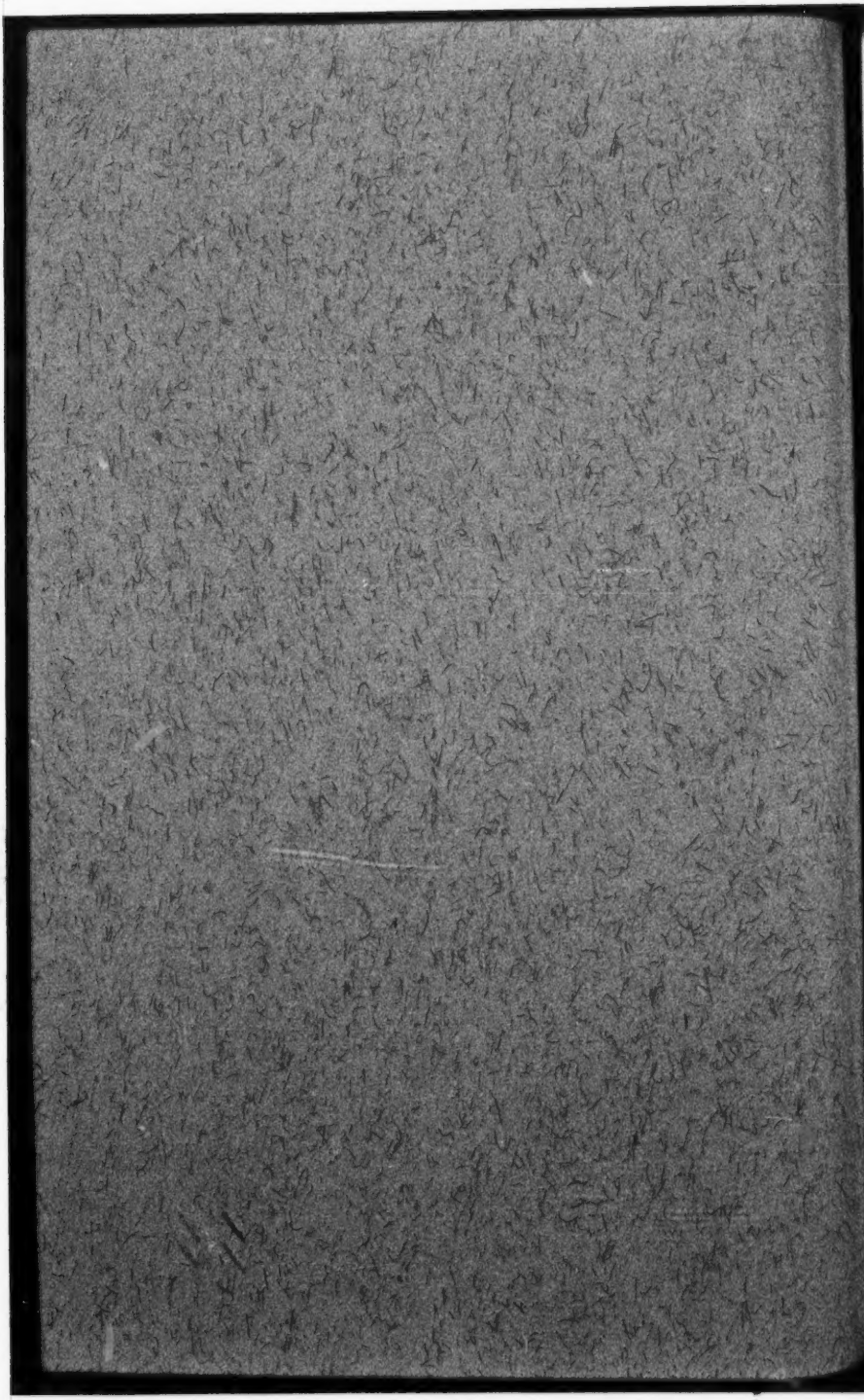

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Fauquier National Bank, as Administrator, c.t.a. of the Estate of Rose Meredith Kessler, Deceased; Thomas F. McGlone, Individually and as executor of the Estate of Thomas F. McGlone, Sr., Deceased; Mabel McGlone; Edward B. McGlone; Robert McGlone; Peter L. Ireton, as Bishop of Diocese of Richmond, a Corporation Sole; and Agnes J. Kean,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

The Petitioner for a Writ of Certiorari respectfully represents to this Honorable Court as follows:

GENERAL

On May 3, 1954 an Opinion was rendered by the Supreme Court of Appeals of Virginia affirming a judgment of the Circuit Court of Prince William County (Rec. p. 10) sustaining Demurrers (Rec. pp. 8 & 10) to a Bill of Complaint filed by Petitioner, (Rec. p. 2) as the lawful

widower of Rose Meredith Kessler, deceased, whereunder he sought to share in the Estate of Rose Meredith Kessler, deceased. The Petitioner previously filed a renunciation to a paper writing, alleged to be the last will and testament of the decedent. All of the heirs at law and next of kin of decedent, and all beneficiaries or representatives of beneficiaries mentioned in the paper writing dated December 4, 1941, which was established and probated as her last will and testament, were joined with the administrator, c.t.a. as parties defendant.

A Dissenting Opinion was filed with the Opinion of the Supreme Court of Appeals of Virginia.

Both Majority and Dissenting Opinions are appended hereto.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Court has jurisdiction to review the judgment herein, by Writ of Certiorari for the following special and important reasons:

1. The Supreme Court of Appeals of Virginia has rendered a decision in conflict with the decision of the Supreme Court of the State of Florida on the same matter.

2. The Supreme Court of Appeals of Virginia has decided an important question of federal law which has not been, but should be settled by this Court.

3. The Supreme Court of Appeals of Virginia has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way not in accord with applicable decisions of this Court.

STATUTORY PROVISIONS AS TO JURISDICTION

This case is within the jurisdiction of this Court under Title 28, Sections 2101c and 1257(3) of the U.S.C., the

Supreme Court of Appeals of Virginia, being the Court of highest jurisdiction in the State of Virginia.

The Judgment herein sought to be reviewed was entered by the Supreme Court of Appeals of Virginia on May 3, 1954. The Judgment of the Circuit Court of Prince William County was entered on March 16, 1948.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are as follows:

1. The right of a widower to proceed through a court of equity for the recovery of his share in the assets of the estate of his deceased wife, there being special facts and circumstances involved, and the complainant being remediless save through the aid of a court of equity.

2. The right of a widower to assert his rights in an estate, which had previously been denied, because of "full faith and credit" having been given to a divorce decree fraudulently obtained against him in Florida,—where such divorce decree thereafter was held as "null and void and without force" by the same court that originally granted same, on the ground of fraud and that the Florida court was without jurisdiction of the parties and the subject matter.

3. Whether the Virginia courts should give full force and effect, under the "full faith and credit" provision of the Constitution of the United States, Article IV, Section 1, to the subsequent decree of the Florida court, declaring a divorce as invalid,—the Florida court under the subsequent decree having set aside and vacated a divorce decree previously granted by the same Florida court.

4. Whether the principles of res judicata should be applied where during an interval in litigation between the same parties, facts have changed or new facts have occurred whereof the legal rights or relations of the litigants have been changed or altered.

CONSTITUTIONAL PROVISIONS INVOLVED

The application of Article IV, Section 1 of the Constitution of the United States known as the "Full Faith and Credit" clause is involved herein. This section provides as follows:

> "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

STATEMENT OF THE CASE

Early in 1946, while your petitioner was gravely ill, his wife Rose Meredith Kessler, proceeded to Florida to establish a simulated residence and obtain a divorce from him. On July 17, 1946 she was awarded a decree of divorce in the Circuit Court in and for Dade County, Florida, without your petitioner having any knowledge whatsoever as to the filing of the divorce proceedings or as to the decree itself. He first learned of the Florida divorce decree the latter part of 1946, shortly before the decease of Rose Meredith Kessler on February 7, 1947. In fact, he was still seriously ill at the time of her decease.

A paper writing dated December 4, 1941 was filed for probate in the Circuit Court of Prince William County, as her last will and testament, and on March 12, 1947, the Fauquier National Bank of Warrenton, Virginia was appointed administrator, c.t.a. of her estate.

Your petitioner was entirely ignored under said will and filed a suit contesting the validity of said paper writing as the last will and testament of decedent, alleging that Rose Meredith Kessler died intestate, and that he was entitled to participate in the assets of decedent, as the surviving spouse. A renunciation previously had been filed by your petitioner.

A Special Plea was filed to petitioner's Bill of Complaint denying that petitioner was the widower of the decedent Rose Meredith Kessler by reason of the divorce decree entered in the State of Florida on July 17, 1946, and alleged that the Florida decree was entitled to and should be given "full faith and credit" in the State of Virginia.

In reply to the affirmative defense interposed through the Special Plea, a Replication was filed refuting the contention that Rose Meredith Kessler had been lawfully divorced from petitioner, and alleging that the divorce was void and of no effect in the State of Virginia.

However, the Circuit Court of Prince William County sustained the Special Plea, its Order of March 16, 1948 providing:

> "The decree of Final Divorce entered by the Circuit Court in and for the County of Dade, Florida on the 17th day of July A.D., 1946, *is entitled to full faith and credit in this Court. . . .*" (italics inserted)

notwithstanding the fraud with which this suit was tainted by reason of the gross fraud perpetrated in the Florida divorce proceeding, and notwithstanding the fact that the Florida Court was without jurisdiction to have granted the divorce.

A Petition for Appeal of this ruling was denied by the Supreme Court of Appeals of Virginia, (187 Va. 62) and this Court declined to review the judgment on Petition for Writ of Certiorari. (335 U.S. 860)

The entire picture changed, however, when the same Court in Florida that granted the illegal divorce on July 17, 1946, actually set aside the divorce decree on November 30, 1950, Ex. E filed with Bill of Comp. on the grounds that the jurisdiction of the Florida court had been fraudulently invoked by Rose Meredith Kessler, because she never was a resident of Florida; because her affidavit for constructive service against your petitioner in that case was false; because she failed to comply with

the laws of Florida; because your petitioner never received notice of that case, and because the Florida court never acquired jurisdiction of the subject matter and of the parties in that case.

The Supreme Court of the State of Florida affirmed the ruling of the Circuit Court of Dade County, Florida, holding the original divorce decree of July 17, 1946, as "null and void and without force", Ex. G filed with Bill of Comp. (55 So.(2) 791) and denied a rehearing in the matter. Ex. F filed with Bill of Comp. As no application for a Writ of Certiorari to the Supreme Court of the United States was filed, the ruling of the Courts of Florida became binding for all purposes in Florida and in all other States, including Virginia, under Article IV, Section 1 of the Constitution of the United States.

Oliver V. Kessler, the petitioner herein, thereupon, as the widower of Rose Meredith Kessler, deceased, was duly appointed Ancillary Administrator of the Estate of Rose Meredith Kessler, deceased, in the State of Florida. Ex. I filed with Bill of Comp.

In view of the divorce decree against petitioner having been set aside and vacated, through *a direct attack* on the Florida proceedings, petitioner was in a position to make a demand thereafter for participation in the assets of his estate as the unquestioned widower of your petitioner. *The legal status of petitioner had been made absolute and the Virginia Courts were bound to respect and honor same.*

It therefore, was in order to file the present Bill of Complaint Ex. A filed with Bill of Comp. for the sole purpose of seeking proper relief herein, and the Virginia Courts, under Article IV, Section 1 of the Constitution of the United States, were required to recognize the Florida decree of November 30, 1950 voiding the Florida divorce decree of July 17, 1946. Ex. E filed with Bill of Comp.

Exhibits were filed with the Bill of Complaint herein, comprising all the proceedings in the State of Florida pertaining to the litigation which resulted in setting aside as "null and void and without force" the said Florida divorce decree of July 17, 1946.

ARGUMENT

General

The present Bill of Complaint was filed herein by your petitioner under the corrective and general equity jurisdiction of the Circuit Court of Prince William County, your petitioner being without adequate relief except through the aid of a court of equity. Special facts and circumstances were pleaded, and for the purpose of the pleading were admitted under the Demurrers filed herein to the Bill of Complaint.

The estate of the decedent was intact at the time the present suit was filed, and is still intact, and the present situation is quite different from cases where distribution or disposition of assets has been made or where the facts are quite distinguishable from those involved herein.

The Supreme Court of Appeals of Virginia, in its Opinion did not take issue with the position of your petitioner in regard to the character of relief sought herein; nor did it deny that the cases of this Honorable Court cited in support of the contention of your petitioner were directly in point.

The Supreme Court of Appeals of Virginia recognized the fact that the illegal divorce decree erroneously granted by the State of Florida on July 17, 1946, had been set aside on November 30, 1950, by the same Court that had granted the decree; *that as a result of this action*, the

legal rights or relations of the litigants had changed during *the interim between litigation.*

The majority Opinion of the Supreme Court of Appeals of Virginia held, however, that the adjudication of March 16, 1948 was a final determination, even though the legal rights or relations of the litigants had changed during such interim, "whether the foregoing decree was right or wrong".

The Dissenting Opinion, however, in quoting from 34 C.J.S., Judgments, Section 712b, page 180, held:

> "The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties *where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants*" (italics inserted)

Res Judicata Does Not Apply

The Supreme Court of Appeals of Virginia has taken an erroneous position that your petitioner is estopped from maintaining the present cause of action because of the prior adjudication in Virginia denying relief to your petitioner.

The prior ruling in Virginia was predicated upon a fraudulent decree in a sister State which later was set aside as "null and void and without force" because the sister State had neither jurisdiction over the parties or the subject matter, and the absolute status of the litigants changed during the interim of litigation.

In connection with the application of Res Judicata, it is stated in 8 Michie's Jurisprudence Former Adjudication, etc., par. 3, that the doctrine of Res Judicata is

> "technical in nature and one who asserts it cannot complain if the proceedings upon which he relies are subjected to technical scrutiny—it is essential to the doctrine that the *identical issue* sought to be relitigated has been settled by a final judgment in which the identical persons or their privies were parties in the *identical capacities* in which they appear in the later litigation". (italics inserted)

Certainly a will contest is somewhat different from the present relief sought. And upon subjecting the present litigation and the proceedings involving the will contest to "technical scrutiny", it is quite apparent that your petitioner did not appear in *identical capacity* in the two proceedings.

In the cases of *Bucher* v. *Cheshire R. Co.*, 125 U.S. 555; *Grant* v. *Phoenix Mutual Life Ins. Co.*, 121 U.S. 105; and *Aurora* v. *West*, 7 Wall. 82, it was held that where a judgment has been reversed on appeal or vacated or set aside by the court that rendered it, it is deprived of its conclusive character and thereafter it *no longer stands as a bar to a further suit on the same cause of action.*

In the cases of *Clarke Realty Co.*, 253 Fed. 938 and *Troxell* v. *Delaware etc. R. Co.*, 185 Fed. 540, it was held:

> "To raise an estoppel by judgment it was not only necessary that the party sought to be barred should have been a party to both actions, *but he must have appeared in both the same character or capacity*". (italics inserted)

2 Freeman on Judgments (5th Ed.), Section 712, in discussing Res Judicata with reference to "after acquired property" and "changed conditions", states, page 1501:

> "no judgment or decree can prejudice rights which had not accrued to either of the parties at the time of its rendition. A decision that a right exists or that a wrongful act has been committed, leaves the party *at liberty to show at a future time that since*

> *the decision was pronounced* the right has expired or *the wrong has been abated.* And the same is true with respect to a decision that no right or cause of action exists; *it does not bar a second action when new facts have created a right or cause of action".* (Italics inserted)

citing *Memphis City Bank* v. *Tennessee,* 161 U.S. 186. In that case the Court stated, pages 192-193:

> "We do not think that the plea of res judicata can be upheld upon the facts stated. The former judgment was entered in an action commenced long prior" to the occurrence of certain matters and "the judgment could therefore not be an estoppel or operate in any manner as a bar to the maintenance of this action; based upon facts of a totally different nature, *and arising long after the judgment was obtained in the former action."* (Italics inserted)

Freeman on Judgments continues on page 1503 as follows:

> *"The estoppel of a judgment extends only to the facts as they were at the time the judgment was rendered,* and as to the legal rights and relations of the parties as fixed by the facts so determined; and when new facts intervene, before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, *the issues are no longer the same and consequently the former judgment cannot be pleaded in bar."* (Italics inserted)

And then on page 1504 of this treatise it is stated:

> "While adjudications affecting the status of parties are governed by the principles of res judicata, where the conditions of considerations upon which this status is determined may change from time to time, an adjudication, while doubtless conclusive as to the situation at the time it was made, *does not prevent a new adjudication based upon subsequent changed conditions"* (Italics inserted)

The above citations definitely support the Dissenting Opinion of the Supreme Court of Appeals of Virginia, holding that the Doctrine of Res Judicata is not applicable herein.

This Court has held repeatedly that the Full Faith and Credit Clause of the Constitution may not be invoked where a judgment was entered by a court wanting in jurisdiction, and inasmuch as the trial court in its Order of March 16, 1948 held that the fraudulent divorce decree rendered in Florida on July 17, 1946, was "entitled to full faith and credit in this Court", that ruling could naturally not be considered under the doctrine of Res Judicata.

In the case of *Old Wayne Mutual Life Association of Indianapolis* v. *McDonough,* 204 U.S. 8, 15, the Court held:

> "The constitutional requirement that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state is necessarily to be interpreted in connection with other provisions of the Constitution, and therefore no State can obtain in the tribunals of other jurisdictions, full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law"

In *Scott* v. *McNeal,* 154 U.S. 34, 46, the Court held:

> "No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party."

In the case of *Thompson* v. *Thompson,* 226 U.S. 551, where a judgment of divorce was obtained in Virginia on service of the summons by publication, it was held that the Full Faith and Credit Clause of the Federal Constitution and the statutes enacted thereunder, do not apply to judgments rendered by a court having no jurisdiction.

In the case of *Corvin* v. *Commonwealth,* 131 Va. 649, on page 656 the Court stated:

> "It seems to be settled since the case of Haddock v. Haddock, 201 U.S. 562, that in cases like this, where the matrimonial domicile was in one state and the divorce is granted in another state, in the suit of one consort who has acquired or who has claimed to have acquired a *bona fide* domicile in such other state, a *decree there obtained without appearance of the defendant is not binding* upon the courts of the State of the original matrimonial domicile under the Federal Constitution." (Italics inserted)

In the case of *Chicago etc. R. Co.* v. *Schendel,* 292 Fed. 326, it was held that in order that a judgment or decree of one state may be recognized and enforced in a sister state, it is necessary that the court which rendered the same should have been possessed of authority to render such judgment, and *should have had jurisdiction of the subject matter of the controversy and the parties;* that a judgment shall be final and not interlocutory, definite and a valid subsisting judgment in the state of its rendition that is not adjudged void, or vacated or reversed.

In the case of *Bowler* v. *Huston,* 30 Gratt. (71 Va.) 266, it was held that in order that a judgment of one state may have in another the effect provided for by the Constitution of the United States, Article IV, Section 1, the court in which the judgment was rendered must have had jurisdiction of the case when it pronounced judgment.

In *Shelton* v. *Sydnor,* 126 Va. 625, it was held that "if either (jurisdiction over parties or subject matter) is wanting, the resulting judgment is void", (following The Resolute, 168 U.S. 437) and such a judgment "is a nullity and may be so treated by all persons, anywhere, at any time, in any manner".

In the case of *Cheely* v. *Clayton,* 110 U.S. 701, a suit was filed by the widow of a decedent to recover such interest in his land as the local statutes gave her. Previously, a decree of divorce was obtained by the husband

upon notice to his absent wife by publication, and it was held that inasmuch the court granting the divorce decree had no jurisdiction therein, there was no bar to an action by the wife to recover her interest in the estate, the court specifically stating on page 708:

> "The decree of divorce being void for the insufficiency of the service, and the status of Clayton and this plaintiff therefore that of husband and wife, according to the law of Colorado, as declared by its highest court, she is entitled as his widow to share which the law of that state gives to a widow in the husband's land within the state".

In other words, Res Judicata applies only where there is a conclusiveness of judgment, and by reason of the fraudulent Florida decree of July 17, 1946, having been held "null and void and without force", the Virginia judgment of March 16, 1948, predicated on this fraudulent decree, was tainted with fraud and would not estop petitioner from seeking relief under the doctrine of Res Judicata.

The Supreme Court of Appeals of Virginia, in its majority opinion in discussing the application of the doctrine of Res Judicata has cited cases which in no wise are applicable herein, such as *Treinies* v. *Sunshine Mining Co. et al,* 308 U.S. 66; *U. S.* v. *Munsingwear, Inc.,* 340 U.S. 36; *Johnson* v. *Muelberger,* 340 U.S. 581, and the other cases also not in point.

In *Treinies* v. *Sunshine Mining Co. et al,* 308 U.S. 66, wherein an interpleader was filed to determine rights between adverse claimants in different states, the court stated (page 76):

> "In the Idaho proceeding the Washington judgment awarding the stock and dividends to Pelkes was pleaded in bar to Mrs. Mason's suit to recover the stock. The effectiveness of the Washington judgment as a bar depended upon whether the court which ren-

> dered it had jurisdiction, *after an order of distribution,* to deal with settlements of distributees with respect to the assets of an estate". (italics inserted)

It is quite important to observe that in that case an order of distribution was involved, whereas in the present case the assets are intact, and in view of the present controversy there has been no order of distribution.

The case of *United States* v. *Munsingwear, Inc.,* 340 U.S. 36, has no application in the present matter. In that case the United States filed a complaint in two counts against respondent, alleging violations of a regulation fixing the maximum price of commodities which respondent sold. The first count prayed for an injunction; the second sought treble damages. By agreement the second count was held in abeyance pending a final determination in the injunction matter. The District Court held that the prices complied with the regulation and dismissed the complaint. While an appeal was pending the commodity involved was decontrolled, and the appeal was dismissed because the case had become moot. Respondent then moved for dismissal of the treble damages action and was sustained on the ground of Res Judicata.

The case of *Johnson* v. *Muelberger,* 340 U.S. 581, had reference to a situation where a decree of divorce was attacked on jurisdictional grounds, notwithstanding the fact that the *parties actually were before the court* in that case.

In *Johnson* v. *Muelberger,* the Court held:

> "When a decree of divorce cannot be attacked on jurisdictional grounds by parties who were actually before the court, or by their privies, or by strangers, in the courts of the State in which the decree was rendered, the Full Faith and Credit Clause precludes their attacking it in the courts of a sister State."

The case of *Baldwin* v. *Traveling Men's Association*, 283 U.S. 522, likewise is not in point herein, as *the petitioner herein did not have his day in court prior to the fraudulent divorce decree having been set aside* in the State of Florida.

The Supreme Court of Appeals of Virginia took the position that at the time of the hearing on the Special Plea and the Replication thereto, in the first suit filed by petitioner, it was quite proper for petitioner to have introduced evidence to disprove the residence in Florida of Rose Meredith Kessler and to have sought to void the Florida divorce decree on the ground of the court having had jurisdiction over the parties and the subject matter. In other words it completely disregarded the fact that the requirements of full faith and credit bar a defendant from *collaterally* attacking a divorce on jurisdictional grounds in the courts of a sister State.

This position is in direct conflict with the opinion of this Court in *Sherrer* v. *Sherrer*, 334 U.S. 343.

In the case of *Sherrer* v. *Sherrer*, 334 U.S. 343, after a divorce was granted to a woman in the State of Florida, it was *collaterally* attacked in the State of Massachusetts, on the ground that the woman was not a bona fide resident of the State of Florida. The Massachusetts Court held the divorce as void and the Supreme Judicial Court of Massachusetts affirmed the trial court.

However, the Supreme Court of the United States reversed the Massachusetts ruling, on the ground that in voiding the Florida decree, the Massachusetts judgment denied full faith and credit to the Florida judgment, contrary to Article IV, Section 1 of the Constitution of the United States.

It was held that the requirements of full faith and credit bar a defendant from collaterally attacking a di-

vorce on jurisdictional grounds in the courts of a sister State, *where the defendant participated in the divorce proceedings and had full opportunity to contest the jurisdictional issues.*

The fact that petitioner had no notice nor knowledge whatsoever of the Florida proceedings, as distinguished from the situation in the *Sherrer* case, certainly could not have weakened petitioner's rights for proper redress herein.

Petitioner is Entitled to Relief in Equity Herein

There can be no doubt but that your petitioner has a right to proceed through a court of equity herein for the recovery of his share in the assets of the estate of his deceased wife under the decision of this Honorable Court.

In the case of *Arkadelphia Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, 145, it explained such right, so well founded in equity—discussing the power of a court of equity to grant relief in cases where a judgment predicated upon another judgment erroneously granted, but later reversed, or set aside, as follows:

> "But, in our opinion, this portion of the claims is allowable against the railway companies themselves upon the principle, long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary, to that which he has lost thereby. This right, so well founded in equity, has been recognized in the practice of the courts of common law from an early period."

In the case of *Phillips* v. *Negley*, 117 U.S. 665, it was held that the appropriate remedy for relief against judgments wrongfully obtained is by *bill in equity.*

In the case of *Borer* v. *Chapman*, 119 U.S. 587, it was held that in cases of administration of assets, courts of equity have a concurrent jurisdiction with courts of law,

and that the jurisdiction of equity to administer the assets of deceased persons has long been recognized. In that case a bill in equity was filed to recover a sum from the assets of an estate, and the courts held that *the right of a complainant is not barred by force of a state statute, and that according to the principles of equity he had a right to recover from the estate.*

As heretofore stated it is impossible to properly challenge the position of your petitioner that he has not had his "day in court" and that he is entitled to seek relief herein through a court of equity for the recovery of his share in the assets of his deceased wife—and which assets have not been distributed and are still intact.

CONCLUSION

In conclusion it is respectfully submitted that the Doctrine of Res Judicata is not applicable herein and that your petitioner is entitled to the relief as prayed for; that a Writ of Certiorari should be granted herein as the Supreme Court of Appeals of Virginia has rendered a decision in conflict with the decision of the Supreme Court of the State of Florida on the same matter; as the Supreme Court of Appeals of Virginia has decided an important question of federal law which has not been, but should be settled by this Court, and because the Supreme Court of Appeals of Virginia has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way not in accord with applicable decisions of this Court.

Respectfully submitted,

MARCUS BORCHARDT
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CHRISTIAN, BARTON, PARKER and BOYD
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APPENDIX

OLIVER V. KESSLER

v.

FAUQUIER NATIONAL BANK, ADMINISTRATOR, ETC., ET AL

Record No. 4185

Opinion by Chief Justice Edward W. Hudgins

Richmond, Virginia—May 3, 1954

Present: All the justices.

From the Circuit Court of Prince William County
Paul E. Brown, Judge

This appeal involves a second suit instituted in the circuit court of Prince William county, Virginia, by Oliver V. Kessler, hereinafter designated complainant, to determine whether he, as the surviving consort, is entitled to participate in the distribution of the estate of Rose Meredith Kessler. In the first suit he was denied this right on the ground that prior to Mrs. Kessler's death she had obtained a valid divorce from him in Florida. The only additional pertinent allegation in the bill filed in this, the second suit, is that, since the final decree was entered in the first suit, complainant had instituted a separate suit in Florida in which the divorce decree was declared null and void. From a decree declaring that the final decree entered in the first suit by the circuit court of Prince William county was conclusive upon the issues raised in this, the second suit, complainant obtained this appeal.

The pertinent facts are that complainant and Rose Meredith Kessler, both then domiciled in Virginia, were married in 1938. They, while living in Virginia, separated in 1944. On July 17, 1946, Rose Meredith Kessler obtained a divorce in the circuit court of the 11th judicial

circuit in and for Dade county, Florida. She died testate on February 7, 1947, and made no provision for her husband in her will, which was duly probated on March 12, 1947, in the circuit court of Prince William county, Virginia. Thomas F. McGlone, Sr., executor named in the will and the Fauquier National Bank of Warrenton qualified as executor and administrator, c.t.a. on her estate.

On July 22, 1947, complainant filed a bill in the first suit in the circuit court of Prince William county naming as defendants the executor and administrator, c.t.a., the devisees, legatees, and the heirs at law and next of kin of Rose Meredith Kessler. The pertinent allegation of the bill was that "said complainant is the widower of said decedent and as such entitled to share in the estate of said decedent under the statute of Virginia". The prayer was that "complainant's interest as the surviving consort of Rose Meredith Kessler may be established . . ."

All the defendants, except one of the legatees, filed a special plea to the bill, in which it was alleged that the "complainant, Oliver V. Kessler, is not the widower of decedent, Rose Meredith Kessler, and is not entitled to share in the estate of said decedent . . ."; and "that the said Rose Meredith Kessler was divorced from Oliver V. Kessler by order of the Circuit Court of the 11th judicial circuit in and for the Dade county Florida, . . . duly entered on the 17th day of July, A.D., 1946."

Complainant filed a written replication to the special plea, in which it was alleged that "the late Rose V. Kessler was not divorced from the compainant, but that at the time of her death said complainant and said Rose Meredith Kessler were lawfully and legally husband and wife; that the alleged divorce was void and of no effect in the State of Virginia; that the said Rose Meredith Kessler for the thirty or more years immediately preceding her death was a *bona fide* resident of Gainesville, in the Gainesville District, Prince William County, Virginia, and never at any time during the said period of thirty years or more a resident of the State of Florida."

The issue thus raised by the special plea and the replication was whether the circuit court of the 11th judicial circuit in and for Dade county, Florida, had jurisdiction

of the parties in order to grant the domiciliary party a valid divorce. On that issue defendants introduced a properly certified copy of the divorce decree and testimony of several witnesses tending to prove that Mrs. Kessler had bought a dwelling in Florida and had moved from Virginia to Florida with the intention of making that State her permanent home. Complainant introduced properly certified copies of the entire record of the divorce procedings in Florida, other exhibits, his own testimony and that of seven other witnesses in support of his contention that he was not served with process, constructively or otherwise, in the divorce suit, and that Mrs. Kessler had never surrendered her domicile in Virginia and had not moved to Florida with the intention of making that her permanent home.

The trial court, after giving the parties full opportunity to introduce such evidence as they desired to support their respective allegations, entered the following decree as its final adjudication of the issues presented:

"This cause coming on to be heard on the 20th day of January, A.D., 1948 upon the Bill of Complaint filed herein by O. V. Kessler, upon the Special Plea to the Bill of Complaint filed herein by Thomas F. McGlone, Sr., Executor, etc., et al, and upon the replication to the Special Plea filed by the Complainant, O. V. Kessler, and witnesses having been sworn and depositions taken in open court and was argued by counsel, and it appearing to the Court that the said Complainant, O. V. Kessler, was validly divorced in the Circuit Court of Dade County, Florida, by order of that Court bearing date of the 17th day of July, A.D., 1946 and is, consequently, no longer a party at interest as to the Estate of Rose McGlone Meredith Kessler, deceased, it is by the Court, this 20th day of January, A.D., 1948,

"ORDERED AND DECREED that the Special Plea filed by the Defendants, Thomas F. McGlone, Sr., Executor, etc., et al, to the Bill of Complaint in this cause is hereby sustained and the decree of Final Divorce entered by the Circuit Court in and for the County of Dade, Florida, on the 17th day of July, A.D., 1946, is entitled to full faith and credit in this court, and the said Complain-

ant, O. V. Kessler, having no further interest in the subject matter of the within cause, the same is hereby dismissed."

This decree was affirmed by this Court on June 15, 1948, 187 Va. LX11, and a writ of *certiorari* to the Supreme Court of the United States was denied on November 8, 1948, 335 U.S. 860. Whether the foregoing decree was right or wrong, it is in Virginia a final determination of the pertinent issues raised or which might have been raised, and as to such issues is binding in any subsequent proceedings between the same parties.

On March 11, 1949, more than four months after the Supreme Court of the United States had denied complainant a writ of *certiorari,* he filed a bill in the circuit court of the 11th judicial circuit in and for Dade county, Florida, against the same defendants, in which he again alleged that Mrs. Kessler, the complainant in the divorce suit, never acquired a domicile in Florida; that no proper process, constructively or otherwise, was served upon him; that the divorce decree entered by that court on July 17, 1946, was null and void; and that he was the surviving husband of Mrs. Kessler.

Some of the defendants in their answer alleged that the former suit instituted by complainant in the circuit court of Prince William county, against the same parties and in which the same issues were raised, constituted a bar to the prosecution of the suit to annul the divorce decree. The Florida court rejected this defense on the ground that: "The courts of Florida have the right to determine whether judgments or decrees which have been entered by them on constructive service were validly entered, and have outlined the procedure by which such determination can be made, and the right of a Florida court to determine whether or not its own jurisdiction has been properly invoked and exercised cannot be barred by what has been determined by the course of any other state, even in a proceeding between the same parties." *Mabson* v. *Mabson,* 104 Fla. 162, 140 Sc. 801 (1&2), was cited to support this ruling.

The same defendants filed an answer denying the pertinent allegations of complainant's bill. On the issues thus raised, complainant himself testified and introduced several other witnesses and exhibits that he had formerly introduced in his suit in the circuit court of Prince William county, and some additional evidence. Defendants likewise introduced some of the same testimony and exhibits that they had introduced in the circuit court of Prince William county where the same question had been litigated.

On consideration of the conflict in evidence, the circuit court of the 11th judicial circuit in and for Dade county, Florida, reached a different conclusion from that reached by the circuit court of Prince William county, Virginia, and held, in accordance with complainant's contention, that Mrs. Kessler had not established a domicile in Florida in accordance with the Florida statutes; that she had not caused proper process, constructively or otherwise, to be served upon her husband; and declared that the divorce decree formerly pronounced by it on July 17, 1946, was null and void.

On December 3, 1952, complainant instituted this a separate and independent suit in the circuit court of Prince William county, Virginia, against the same defendants named in the former suit, except that the executor, devisees and legatees of Thomas F. McGlone, Sr., who had died, were substituted for him as parties defendant.

The bill is long and verbose. It refers to the various suits heretofore mentioned and avers complainant's conclusions of law. The only additional pertinent averment of fact not made in the first suit instituted in Prince William county is that, since the final decree entered by it, the circuit court of the 11th judicial circuit in and for Dade county, Florida, had declared the divorce decree of July 17, 1946, null and void. The entire record of the Florida suit in which the divorce decree was set aside was filed as an exhibit. The pertinent relief prayed for in the second bill, while couched in different language, was the same as that prayed for in the first bill; namely, that the court declare complainant the surviving husband of Rose Meredith Kessler with the right to share in the distribu-

tion of her estate. The additional pertinent prayer in the bill filed in the second suit is "that the court set aside the final order entered on January 20, 1948, sustaining the special plea and holding in effect that complainant, Oliver V. Kessler, had no rights herein."

Defendants demurred to the bill on various grounds, among others, that the final decree in the first suit instituted by complainant in the circuit court of Prince William county was a bar to his right to maintain the second suit. It is unusual for a defendant to assert the defense of *res judicata* or estoppel by judgment by demurrer. Whether the former adjudication is affirmatively or defensively asserted, the record of the prior action must be made a part of the record in the second action. However, in this case the attorneys for the respective parties, both in their briefs and oral argument, made frequent references to the record in the former suits, and at the bar of the Court agreed that in deciding the questions presented the Court should consider the various records of the former proceedings. From these records we have ascertained the pertinent facts heretofore stated.

Complainant contends that under the full faith and credit provision of the Constitution of the United States, Article IV, section 1, the Virginia court must give full force and effect to the subsequent decree of the Florida court declaring the divorce invalid, and reverse its former adjudication that the Florida divorce was valid.

It is stated in the complainant's brief that he knew in the latter part of 1946 before his wife's death that she had obtained a divorce against him in Florida. Inasmuch as he has not appeared in the divorce proceedings and had not been served personally with the process, he had the election of contesting the validity of the divorce on jurisdictional grounds either in the State of his domicile, Virginia, or in the Florida court where the divorce was granted. Having elected to invoke the jurisdiction of the Virginia court, he is estopped from again litigating the same question in any other proceeding in a Virginia court. *Patterson* v. *Saunders*, 194 Va. 607, 74 S.E. 2d 204.

It is said in *Williams* v. *North Carolina,* 325 U.S. 226, 231, 65s. Ct. 1092, 89 L. ed. 1577: ". . . If a finding by the court of one State that domicil in another State has been abandoned were conclusive upon the old domiciliary State, the policy of each State in matters of most intimate concern could be subverted by the policy of every other State. This Court has long ago denied the existence of such destructive power. The issue has a far reach. For domicil is the foundation of probate jurisdiction precisely as it is that of divorce. The ruling in *Tilt* v. *Kelsey,* 207 U.S. 43, regarding the probate of a will, is equally applicable to a sister-State divorce decree: 'the full faith and credit due to the proceedings of the New Jersey court do not require that the courts of New York shall be bound by its adjudication on the question of domicil. On the contrary, it is open to the courts of any State in the trial of a collateral issue to determine upon the evidence produced the true domicil of the deceased'. 207 U.S. 43, 53.

". . . In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable."

Complainant, with full knowledge that his wife prior to her death had obtained a divorce against him in Florida, instituted the first suit in Prince William county, alleging that he was entitled to the rights of a surviving consort. He made no reference in his bill to the divorce, the validity of which at that time had not been challenged. He should have anticipated and probably did anticipate that the Florida divorce would be pleaded in defense of the rights asserted. Such a plea was filed on September 10, 1947. Complainant's replication denying its validity was filed on October 6, 1947, and, after giving complainant time and opportunity to get all pertinent evidence on the issue, the case was heard and decided three months later, on January 20, 1948.

Chief Justice Vinson in *Sherrer* v. *Sherrer,* 334 U.S. 343, 68 S. Ct. 1087, 1090, 92 L. ed. 1429, stated that in the federal court ". . . the rule has evolved that the doctrine

of res judicata applies to adjudications relating either to jurisdiction of the person or of the subject matter where such adjudications have been made in proceedings in which those questions were in issue and in which the parties were given full opportunity to litigate."

The limitation and the extent of the full faith and credit clause of the Constitution of the United States were discussed in *Johnson* v. *Muelberger,* 340 U.S. 581, 71 S. Ct. 474, 95 L. ed. 552. Mr. Justice Reed, in delivering the majority opinion, at p. 585 (340 U.S.) said: "This constitutional purpose promotes unification, not centralization. It leaves each state with power over its own courts but fiinds litigants, wherever they may be in the Nation, by prior orders of other courts with jurisdiction. 'One trial of an issue is enough. The principles of *res judicata* apply to questions of jurisdiction as well as to other issues, as well to jurisdiction of the subject matter as of the parties.' The Federal purpose of the clause makes this Court, for both state and federal courts, the 'final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause.'"

In *Baldwin* v. *Traveling Men's Assn.,* 283 U.S. 522, 525, 51 S. Ct. 517, 518, 75 L. ed. 1244, 1247, it was held: "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

The same question now under consideration was raised in *Hammell* v. *Britton,* 119 Pac. 2d 333, 19 Cal. 2d 72. There, in the first proceeding in California, the validity of a Colorado judgment was raised and the judgment held valid. Subsequently, the Colorado court declared its first judgment null and void. In a second proceeding in California it was contended that the second judgment in Colorado made the first judgment in California invalid. Speaking to the issue it was said: "The full faith and credit

clause does not compel this court to set aside a judgment rendered in an action involving the same issue which has subsequently been adjudicated by a court of a sister state. To so apply that clause would result in giving greater faith and credit to the judgments of the courts of other states than to those of the courts of this state. That provision of the Constitution cannot reasonably be interpreted to authorize a person to litigate a question ad infinitum. If full faith and credit is to be given, it should have been given to the California judgment by the Colorado court when entertaining the plaintiff's action which resulted in the second Colorado judgment." *U. S.* v. *Munsingwear, Inc.*, 340 U.S. 34; 71 S. Ct. 104, 95 L. ed. 36; 3 Freeman on Judgments, 5th ed., sec. 1214.

The question of the power of an Idaho court to determine the jurisdiction of a Washington court was raised in *Treinies* v. *Sunshine Min. Co.*, 308 U.S. 66, 60 S. Ct. 44, 84 L. ed. 85. In determining this question, at page 78 (308 U.S.) it was said: "The Court of Appeals correctly determined that the issue of jurisdiction *vel non* of the Washington court could not be relitigated in this interpleader. As the Idaho District Court was a court of general jurisdiction, its conclusions are unassailable collaterally except for fraud or lack of jurisdiction. The holding by the Idaho court of no jurisdiction in Washington necessarily determined the question raised here as to the Idaho jurisdiction against Miss Treinies' contention. She is bound by that judgment.

"The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.

"One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter of the parties."

It was held in *Suter* v. *Suter*, 128 W. Va. 511, 37 S.E. 2d. 474, that under the full faith and credit clause of the federal constitution a state court is not required to give

to the decree of a court of a sister-state a higher degree of force and effect than that accorded to the decrees of its own courts.

It was held in *McClung* v. *Folks,* 126 Va. 259, 266, 101 S.E. 345, that: ". . . The interests of society require that there be an end of litigation. No maxim of the law is more firmly established. For this reason the rule has always been strictly adhered to that, however material may be the newly discovered evidence, a new trial will not be granted on that account unless such evidence could not have been discovered by the exercise of reasonable diligence in time for use at the former trial. . . ." *Patterson* v. *Anderson,* 194 Va. 557, 74 S.E. 2d 195. There is no suggestion that the decree in the first suit in Virginia was tainted with either intrinsic or extrinsic fraud.

The circuit court of Prince William county did not rely upon the statement on the face of the divorce decree that the Florida court had jurisdiction of the plaintiff, but made a separate and independent inquiry on that issue and the issue of constructive service. It considered the evidence with the pertinent Florida statutes on divorce proceedings before it.

Under these circumstances, to give full force and effect to the second Florida decree in the divorce proceedings would be giving greater force and effect to the judgment of a sister-state than we give to the judgments of our own courts, and would permit a litigant to litigate the same question indefinitely. We, therefore, affirm the decree of the trial court.

AFFIRMED.

Justice C. Vernon Spratley, dissenting.

OLIVER V. KESSLER

-v-

FAUQUIER NATIONAL BANK
ADMINISTRATOR, ETC., ET AL.

Record No. 4185

DISSENTING OPINION BY JUSTICE C. VERNON SPRATLEY

I am constrained to dissent from the opinion of the majority because I am unable to agree that the principles of *res judicata* should be applied under the circumstances of this case to defeat the marital rights of the appellant.

In 34 C.J.S., Judgments, Section 712b, page 180, this is said:

"The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a reexamination of the same questions between the same parties where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants."

VIRGINIA:

In the Supreme Court of Appeals held at the Court Library Building in the City of Richmond on Monday the 3rd day of May, 1954.

Oliver V. Kessler, Appellant

against Record No. 4185

Fauquier National Bank, as Administrator, c.t.a. of the Estate of Rose Meredith Kessler, deceased; Thomas F. McGlone, individually and as Executor of the Estate of Thomas F. McGlone, Sr.; Edward B. McGlone; Robert McGlone; Peter L. Ireton, as Bishop of Diocese of Richmond, a corporation sole; Agnes J. Kean and Mabel McGlone, Appellees.

Upon an appeal from a decree entered by the Circuit Court of Prince William County on the 20th day of March, 1953.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree appealed from. It is therefore adjudged, ordered and decreed that the same be, and is hereby affirmed, and that the appellant pay to the appellees thirty dollars damages and also their costs by them expended about their defense herein.

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In The

Supreme Court of the United States

October Term, 1954

No. 245

Oliver V. Kessler

Petitioner

vs.

Fauquier National Bank, as Administrator, c.t.a. of the Estate of Rose Meredith Kessler, Deceased; Thomas F. McGlone, Individually and as Executor of the Estate of Thomas F. McGlone, Sr., Deceased; Mabel McGlone; Edward B. McGlone; Robert McGlone; Peter L. Ireton, as Bishop of Diocese of Richmond, a Corporation Sole; and Agnes J. Kean

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The statement of the case as set forth in the petition for writ of certiorari is somewhat vague and confusing and the facts of the case are more clearly set forth, with

one exception, in the majority opinion of the Supreme Court of Appeals of Virginia commencing on page 18 of the appendix to the petition.

The opinion fails to cover a material part of the history of the case which is set out in paragraph 20 of petitioner's complaint and filed on the 3rd day of December, 1952, in the Circuit Court of Prince William County, Virginia and which appears on page 6 of the printed record before the Supreme Court of Appeals of Virginia. The allegation of this paragraph is that petitioner, after a final decision in the Florida proceedings, filed a petition in the original cause in the Circuit Court of Prince William County, Virginia, to set aside the final order sustaining the special plea and dismissing cause and to enter an order holding petitioner to be the widower of the decedent and entitled to share in the estate of the decedent. This petition was dismissed by the Court and there is no record of any appeal being noted to the action of the Court.

The record in the original cause, in which the present petitioner also filed a petition for a writ of certiorari, is numbered 344 of the October Term, 1948, of this Court and titled "O. V. Kessler, petitioner, v. Thomas P. McGlone, Sr., Executor, et als, respondents" and in which matter a petition for writ of certiorari was denied by this Court. 335 United States 860.

The Circuit Court of Prince William County, Virginia, is a record Court of original and general jurisdiction. Title 17, Section 123 of the 1950 Code of the Commonwealth of Virginia.

2.

ARGUMENT

The petitioner, with the knowledge that the decedent had obtained a decree of divorce from him in Florida, chose the Circuit Court of Prince William County, Virginia, to litigate the question as to whether he was the surviving spouse of the decedent. After a full hearing covering the jurisdiction of the Florida Court to grant a judgment of divorce to the decedent full faith and credit was given to the Florida decree and the litigation was finally decided adversely to the petitioner.

The petitioner then obtained a favorable decision in the Courts of the State of Florida which refused to give full faith and credit to the Virginia judgment and entered a judgment setting aside the decree of divorce which was granted to the decedent.

The petitioner then filed a petition in the original proceedings in Prince William County, Virginia, requesting that that Court, on the basis of the Florida decree, enter an order that he was the widower of the decedent. This petition was denied and no appeal taken from the action of the Court.

The petitioner then filed the complaint in the instant case alleging in detail all the prior litigation and praying that the Court enter an order that he is the widower of the decedent and entitled to a widower's portion of her estate.

Demurrers were filed by the respondents and were sustained by the Circuit Court of Prince William County. An appeal was granted to the Supreme Court of Appeals of Virginia which affirmed the decision of the trial Court and which appears in the appendix to the petition filed herein commencing on page 18.

The finality of such a judgment was passed upon by this Court in the case of Reed, et al v. Allen, 286 U. S. 191, 52 Supreme Court Reporter 532, in which this Court, at page 199, made the following statement:

> "The rule has been settled for this court that, where a judgment in one case has successfully been made the basis for a judgment in a second case, the second judgment will stand as res judicata, although the first judgment be subsequently reversed. Deposit Bank v. Frankfort, 191 U. S. 499, 24 S. Ct. 154, 48 L. Ed. 276. There a federal court had upheld a contract of exemption from taxation, basing its decision upon the judgment of a state court of first instance. Subsequently that judgment was reversed. On error to the state court of appeals, it was held that under the doctrine of res judicata the judgment of the federal court estopped each party from again litigating the question."

Again at page 200 and 201 the court made the following statement:

> "'If the judgment roll was competent evidence when received,' the state court said, 'its reception was not rendered erroneous by the subsequent reversal of the judgment. Notwithstanding its reversal, it continued in this action to have the same effect to which it was entitled when received in evidence. The only relief a party against whom a judgment, which has been subsequently reversed, has thus been received, in evidence, can have, is to move, on that fact, in the court of original jurisdiction, for a new trial; and then the court can, in the exercise of its discretion, grant or refuse a new trial, as justice may require.'
>
> • • • •
>
> These decisions constitute applications of the general and well-settled rule that a judgment, not set aside on appeal or otherwise, is equally effective as an estoppel upon the points decided, whether the decision be right or wrong." • • •

"The indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert."

The same question was again presented to this Court in the case of Treinies v. Sunshine Mining Co., et al, 308 U. S. 66, 60 Supreme Court Reporter 44, wherein the Court, commencing at page 76, made the following statement:

"In the Idaho proceeding the Washington judgment awarding the stock and dividends to Pelkes was pleaded in bar to Mrs. Mason's suit to recover the stock. The effectiveness of the Washington judgment as a bar depended upon whether the court which rendered it had jurisdiction, after an order of distribution, to deal with settlements of distributees with respect to the assets of an estate. On consideration it was determined in the Idaho proceeding that the Washington court did not have this jurisdiction and that the stock of the Mining Company became the property of Mrs. Mason. In declining to give effect to the Washington decree for lack of jurisdiction over the subject matter the Idaho court determined also the basic question raised by petitioner in the interpleader action. The contention of petitioner in the interpleader proceedings that the Idaho court did not have jurisdiction of the stock controversy because that controversy was in the exclusive jurisdiction of the Washington probate court must fall, because of the Idaho decision that the Washington probate court did not have exclusive jurisdiction. This is true even though the question of the Washington jurisdiction had been actually litigated and decided in favor of Pelkes in the Washington proceedings. If decided erroneously in the Idaho proceedings, the right to review that error was in those (the Idaho) proceedings. While petitioner sought review from the decree of the Supreme Court of Idaho by petition for certiorari to this Court, which was denied, no review was sought from the

final decree of the Idaho District Court of August 18, 1936, on new findings of fact and conclusions of law on remittitur from the Supreme Court of Idaho.

The Court of Appeals correctly determined that the issue of jurisdiction vel non of the Washington court could not be relitigated in this interpleader. As the Idaho District Court was a court of general jurisdiction, its conclusions are unassailable collaterally except for fraud or lack of jurisdiction. The holding by the Idaho court of no jurisdiction in Washington necessarily determined the question raised here as to the Idaho jurisdiction against Miss Treinies' contention. She is bound by that judgment.

The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.

One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues,' as well to jurisdiction of the subject matter as of the parties."

The very same situation presented in the instant case appears in the case of Hammel v. Britton, et al, 19 Cal. (2d) 72, 119 Pac. (2d) 333, and wherein the question was fully discussed and that Court then made the following statement:

"Under these circumstances it cannot be seriously doubted that the California judgment was an adjudication on the validity of the Colorado divorce decree and first judgment vacating said decree. The full faith and credit clause does not compel this court to set aside a judgment rendered in an action involving the same issue which has subsequently been adjudicated by a court of a sister state. To so apply that clause would result in giving greater faith and credit to the judgments of the courts of other states than to those of the courts of this state. That provision of the Constitution cannot reasonably be interpreted to authorize a person to litigate a question ad in-

finitum. If full faith and credit is to be given, it should have been given to the California judgment by the Colorado court when entertaining the plaintiff's action which resulted in the second Colorado judgment."

3.

CONCLUSION

It is respectfully submitted that the petitioner was bound by the final judgment which gave full faith and credit to the judgment of divorce granted to the decedent and that the decision of the Supreme Court of Appeals of Virginia is correct and that the petition for a writ of certiorari should be denied.

Respectfully yours,

JOHN A. K. DONOVAN
CORNELIUS H. DOHERTY
JOHN G. TURNBULL
PHILIP N. BROPHY
Counsel for Respondents

NOV 5 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1954

No. 245

OLIVER V. KESSLER,

Petitioner,

vs.

FAUQUIER NATIONAL BANK, AS ADMINISTRATOR, C.T.A. OF THE ESTATE OF ROSE MEREDITH KESSLER, DECEASED; THOMAS F. McGLONE, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF THOMAS F. McGLONE, SR., DECEASED; MABEL McGLONE; EDWARD B. McGLONE; ROBERT McGLONE; PETER L. IRETON, AS BISHOP OF DIOCESE OF RICHMOND, A CORPORATION SOLE; AND AGNES J. KEAN,

Respondents

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

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Respondents

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

The petitioner, Oliver V. Kessler, respectfully requests a rehearing of Order denying certiorari herein, and respectfully represents as follows:

GENERAL

On October 14, 1954, the Petition for Writ of Certiorari to the Supreme Court of Appeals of the State of Virginia, was denied.

The case presents a very important Federal question as to rights claimed under the Full Faith and Credit Clause of the Constitution, and it is respectfully submitted that this Honorable Court should reconsider and re-evaluate the issues herein.

It involves the right of your petitioner to share in the assets of decedent, in Virginia and in Florida. A fraudulent divorce was obtained by decedent against petitioner in Florida in 1946, and subsequently was set aside by the same Court that had granted it, and your petitioner is considered by the Florida courts as the lawful widower of decedent. Ironically, however, your petitioner has been considered as divorced in the Virginia courts since the fraudulent decree of 1946, obtained in Florida, as aforesaid.

The case also involves a holographic will which is recognized in Virginia, but which has no legal effect as to real estate in Florida. There the decedent is considered to have died intestate as to such real estate. A demand has been made by the ancillary administrator, c.t.a., duly appointed and serving in the State of Florida, upon the Fauquier National Bank of Warrenton, Virginia, the administrator, c.t.a., for rental collections made by the Bank on the Florida real estate, prior to the appointment of the ancillary administrator, c.t.a., *but the Bank has declined and continues to decline* to remit said rental collections to the ancillary administrator, c.t.a. This situation, in itself, is of substantial importance to warrant a rehearing of the Order denying certiorari.

ARGUMENT

Brief Reference to Facts

The facts are clearly set out in the Statement of the Case on pages 4 to 7 of the petition for certiorari filed

herein, and will not be restated except for purpose of clarifying the questions presented for review.

A fraudulent divorce was obtained by the late Rose Meredith Kessler, in the State of Florida on July 17, 1946. She died on February 7, 1947, and on March 12, 1947 the Fauquier National Bank of Warrenton, Virginia was appointed administrator, c.t.a. of her estate.

A holographic paper writing dated December 4, 1941, was filed for probate in the Circuit Court of Prince William County, as the last will and testament of decedent's, and your petitioner, who was entirely ignored under said will, filed a renunciation thereto.

Your petitioner, who was unaware of the Florida divorce proceedings or the divorce decree until sometime thereafter, because of his serious illness, filed a suit contesting the validity of said will and claimed that he was entitled to participate in the assets of the decedent both in Virginia and in Florida, as the surviving spouse.

He was denied relief because of the divorce decree obtained by the late Rose Meredith Kessler on July 17, 1946.

However, this decree was set aside and vacated on November 30, 1950 by the same Court that had granted it, "as null and void and without force", as above set forth. This ruling of the Circuit Court of Dade County, Florida was affirmed by the Supreme Court of the State of Florida, and as no application was filed with the Supreme Court of the United States for a Writ of Certiorari, the decree voiding the divorce and holding your petitioner as the widower of the late Rose Meredith Kessler became binding under Article IV, Section 1 of the Constitution of the United States.

Your petitioner thereupon was appointed ancillary administrator, c.t.a. of the estate of Rose Meredith Kessler in the State of Florida and is serving as such.

Subsequent to this decree of November 30, 1950, your petitioner filed the present Bill of Complaint seeking relief through a Court of Equity, and such relief was denied, notwithstanding the fact that the status of your petitioner, had legally changed. The estate, consisting principally of real estate in Virginia and Florida and rental collections thereon is still intact in both Virginia and Florida.

Your petitioner, as ancillary administrator, c.t.a., in Florida, also has been making demands upon the Fauquier National Bank of Warrenton, Virginia, for rental collections made on the Florida property, but said Bank declines to make such remittances and thus comply with the Florida law, as aforesaid.

Jurisdiction

The present case unquestionably presents important questions that should be clarified and specifically ruled upon by the Supreme Court of the United States. The relative rights of your petitioner in Florida and in Virginia should be clarified. The question of applicability or inapplicability of Res Judicata herein, is in marked conflict.

As to the holographic will, the Fauquier National Bank of Warrenton, Virginia, the administrator, c.t.a., in total disregard of the Florida laws, continues to decline to make remittance to the ancillary administrator, c.t.a. in Florida, of emoluments pertaining to real estate in Florida, as aforesaid.

As to Res Judicata, the Supreme Court of Appeals of Virginia in its Dissenting Opinion referred to the in-

applicability of Res Judicata herein, (page 8 of Petition for Writ) as follows:

> "The estoppel of a judgment extends only to the facts in issue as they existed at the time the judgment was rendered, and does not prevent a re-examination of the same questions between the same parties *where in the interval the facts have changed or new facts have occurred which may alter the legal rights or relations of the litigants*". (Italics inserted)

whereas the Supreme Court of Appeals of Virginia, in its Majority Opinion (page 21 of Petition for Writ) held:

> "*Whether the foregoing decree was right or wrong,* it is in Virginia a final determination of the pertinent issues raised or which might have been raised, and as to such issues is binding in any subsequent proceedings between the same parties". (Italics inserted)

The following cases have reference to both the right and duty of the Supreme Court of the United States to review a decision of a State court involving rights under the Federal Constitution.

In Grand River Dam Authority v. Grand-Hydro, 335 U.S. 359, it was held:

> "The fact that a state court purports to rest its decision largely on state law does not eliminate the duty of the United States Supreme Court to consider a Federal question, properly raised and presented, which is necessarily, although only impliedly, adjudicated by the state court."

In Dixon v. Duffy, 344 U.S. 143, it was held:

> "Doubt as to jurisdiction of the Supreme Court to review a state court judgment, arising from a controversy as to whether the judgment rests on an ade-

quate state ground, should not deprive a party of his day in the Supreme Court of the United States."

In Hammerstein v. Superior Court of California, 340 U.S. 622, it was held:

> "That the Supreme Court of the United States will review judgments of state courts where the application for review is based upon a determination of the merits of petitioner's Federal claim".

In Backus v. Fort Street Union Depot Co., 169 U.S. 577, it was held:

> "The United States Supreme Court has jurisdiction to review the decisions of a state court where the respondent specifically set up and claimed in the state court rights under the Federal Constitution and such rights were denied him".

In Green v. Van Buskirk, 7 Wall. 139, it was held:

> "A decision of a state court which denies to the judgment of a sister state an effect claimed for it by a party is reviewable by the United States Supreme Court".

CONCLUSION

It is respectfully submitted that the grounds for a rehearing of Order denying certiorari herein, have been clearly and directly set out, in accordance with the requirements of this Honorable Court, and in keeping with its pronounced doctrine that this Honorable Court "should not deprive a party of his day in the Supreme Court of the United States", the present petition for rehearing of the Order denying certiorari should be granted.

Respectfully submitted,

MARCUS BORCHARDT
Counsel for Petitioner

Certificate of Counsel

I, Marcus Borchardt, counsel for petitioner herein, do certify hereby that the foregoing petition for rehearing is presented in good faith, and not for delay, and is restricted to the grounds as specified by the Rules.

Marcus Borchardt
Counsel for Petitioner